Supreme Court, U.S.
FILED
JUL 29 1994
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No. 94-14

In The

Supreme Court of the United States

October Term, 1994

UNITED STATES OF AMERICA ex rel. KENNETH MOSAY, MARY WASHINGTON, and ARCHIE MOSAY, Individually and on behalf of the ST. CROIX BAND OF CHIPPEWA INDIANS,

Petitioners,

vs.

BUFFALO BROTHERS MANAGEMENT, INC., an Illinois Corporation, INTERSTATE GAMING SERVICES, INC., an Illinois Corporation, ROY C. PALMER, and RONALD G. BROWN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should grant Petitioner's Writ of Certiorari to review whether the Seventh Circuit Court of Appeals properly applied the plain language of 25 U.S.C. § 81 and the Indian Gaming Regulatory Act (25 U.S.C. § 2701 *et seq.*) to affirm the dismissal of Petitioners' lawsuit?

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STATEMENT OF THE CASE

I. Nature Of The Case

This case concerns two management agreements (the "Management Agreements") for tribal casinos in Turtle Lake and Danbury, Wisconsin. The parties to the Management Agreements are one of the Respondents, Buffalo Brothers Management, Inc. ("Buffalo Brothers") and the St. Croix Chippewa Indians of Wisconsin (the "St. Croix Chippewa"). Buffalo Brothers and the St. Croix Chippewa are satisfied with the Management Agreements and, on January 28, 1992, the Bureau of Indian Affairs ("BIA") (as delegated by the Secretary of the Interior) officially approved the Management Agreements as required by 25 U.S.C. § 81. Petitioners are three dissident members of the St. Croix Chippewa,[1] one of whom voted as a member of the St. Croix Tribal Council in favor of entering into the Management Agreements with Buffalo Brothers. (R. 88, p. 99; R. 87, p. 138, 142-43).[2] Nonetheless, after the tribal casinos opened and were successful, the Petitioners filed

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[1] The caption of the case, chosen by the Petitioners, is misleading to the extent it suggests they are proceeding on behalf of the St. Croix Chippewa. As set forth herein, the St. Croix Chippewa fully support Buffalo Brothers and at all stages have vigorously opposed the Petitioners' actions.

[2] Citations to portions of the record in the Court of Appeals are designated (R. ___) and refer to the district court docket record numbers. That docket record is contained at item 1 in the Petitioners' Appendix submitted to the court of appeals. Citations to Petitioners' Court of Appeals Appendix are referenced as "C.A. App. ___". The decisions below are referred to by reference to the Petitioners' Appendix before this Court as "App. ___."

this lawsuit to void the Management Agreements and recover half of the proceeds pursuant to 25 U.S.C. § 81. The total value of these proceeds exceeds $10 million.

II. The Parties And Proceedings Below

The Petitioners, Kenneth Mosay, Mary Washington, and Archie Mosay ("Petitioners"), filed this litigation in the United States District Court for the Western District of Wisconsin. Counts I and II of Petitioners' Complaint alleged that the Management Agreements were not approved by the BIA pursuant to 25 U.S.C. § 81. Counts III and IV of Petitioners' Complaint alleged violations of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.* Although Petitioners hint at claims of improper self-dealing, there was no breach of fiduciary duty claim alleged in the Complaint. (R. 2).

The Respondents are Buffalo Brothers Management, Inc., Interstate Gaming Services, Inc., Ronald Brown and Roy Palmer. Respondents moved to dismiss Counts III and IV because IGRA provides no private cause of action and also moved to dismiss the entire case for failure to join the St. Croix Chippewa as an indispensable party and for lack of standing. (R. 5). The St. Croix Chippewa, through its Tribal Council, joined in supporting Respondents' motion. (R. 19). On March 16, 1993 the district court dismissed the IGRA claims contained in Counts III and IV because IGRA provides no private cause of action. (R. 32).

Several months later, Petitioners and Respondents filed cross motions for summary judgment. (R. 53, 71). The St. Croix Chippewa joined Respondents' position and

opposed Petitioners. (R. 69). On August 17, 1993 the district court entered summary judgment in favor of Respondents finding that the Management Agreements were properly approved by the BIA. (R. 162; App. 14a-23a). Petitioners appealed to the Seventh Circuit Court of Appeals. (R. 185). The court of appeals affirmed the district court decision. (App. 1a-13a). The court of appeals held that the Management Agreements were properly approved by the BIA, and a separate lease agreement between Interstate Gaming Services, Inc. ("Interstate") and the St. Croix Chippewa was not subject to review under 25 U.S.C. § 81. (*Id.*)

III. Factual Background

The St. Croix Chippewa are a federally recognized Indian tribe residing on lands within the State of Wisconsin. They are not a party to this action and opposed the suit in both the district court and the court of appeals. (R. 19, 69). Petitioners Kenneth Mosay, Mary Washington and Archie Mosay are enrolled St. Croix Chippewa. (R. 87, pp. 138, 142, 143; R. 88, p. 99; R. 82, Exh. 3). Buffalo Brothers and Interstate are Illinois corporations and Roy C. Palmer and Ronald G. Brown are individuals residing outside of Wisconsin, each of whom has interests in Interstate and Buffalo Brothers.

A. The Interstate Lease Agreement

Like many Indian tribes across the nation, the St. Croix Chippewa are involved in various Indian gaming activities. (R. 87, p. 68; R. 77, p. 2 ¶ 4; R. 78, pp. 4-5 ¶ 12). In January 1991, the St. Croix Chippewa negotiated a

five-year equipment lease with Interstate whereby Interstate would supply slot machines to the St. Croix Chippewa on standard terms offered in the industry. (R. 87, pp. 90-91). The lease provided that Interstate would supply video and slot machines at no risk to the Tribe and the St. Croix Chippewa would retain 70 percent of the money generated by the machines and Interstate would retain the balance as its lease payment. (C.A. App. 6-27, Sec. IV A-E). Petitioner Kenneth Mosay testified that this lease was a "fair agreement," the percentage split was "average," and the same rate was quoted to the Tribe by at least one other potential lessor. (R. 87, p. 99).

Petitioners do not challenge this lease and the district court found that "[i]t is conceded by plaintiffs' that the Interstate lease is not an agreement relating to Indian lands which requires independent approval under 25 U.S.C. § 81." (App., p. 21a). The Seventh Circuit agreed and concluded that the Interstate Lease "is not a contract for services 'relative to [Indian] lands' as that term has been interpreted in cases under 25 U.S.C. § 81." (App., p. 4a).

B. The Buffalo Brothers Management Agreements

In June 1991, the United States District Court for the Western District of Wisconsin opened the door for expanded Indian gaming in Wisconsin. *See Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480 (W.D. Wis. 1991). The St. Croix Chippewa and other tribes began to explore opportunities for casino-type gaming such as slot machines, black jack, etc. (R. 82, p. 177). In August 1991, Buffalo Brothers entered

into a management agreement with the St. Croix Chippewa for the Turtle Lake Casino. A management agreement between Buffalo Brothers and the St. Croix Chippewa for a smaller secondary casino operation in Danbury, Wisconsin was signed September 20, 1991. (R. 81, Exh. 11, p. 29).

The Management Agreements were entered into after the St. Croix Chippewa leadership, including both Petitioners Mosay and Washington, solicited and considered in an open process competing proposals from casino management companies to provide expertise and financial backing to create a casino gaming operation. (R. 87, pp. 122-23; R. 88, p. 53). Buffalo Brothers participated in the bidding process. (R. 87, pp. 132-34). The St. Croix Chippewa were aware throughout that process of their pre-existing Interstate lease obligation and were aware that Palmer and Brown were Interstate shareholders. (R. 88, p. 99; R. 87, pp. 131, 142 and 143; R. 82, pp. 41, 53, 54, 96).

Ultimately, Buffalo Brothers and another management company, Grand Casino, Inc., made proposals to the St. Croix Chippewa to supervise the construction, staffing and management of the new casino. (R. 87, pp. 132-34). After reviewing the proposals by Grand Casino and Buffalo Brothers both internally and with its attorneys and advisors, the St. Croix Tribal Council approved, and Petitioner Ken Mosay voted in favor of an agreement with

Buffalo Brothers for management of a Turtle Lake casino. (R. 87, p. 138 and Exh. 5 (tribal resolution)).[3]

At the time the Management Agreements were signed, the St. Croix Chippewa had substantial experience in dealing with complex legal and business matters. Aside from operating the tribal affairs generally, they had actively participated in legal actions to open lands to gaming with their counsel, Howard Bichler, and had been in the forefront of seeking expanded opportunities for Native Americans. *See, e.g., Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 775 F. Supp. 321 (W.D. Wis. 1991) (St. Croix Band was a named plaintiff in treaty rights action). The financial terms of the Management Agreements comply with the financial requirements of IGRA and the State of Wisconsin/St. Croix Chippewa Gaming Compact. (R. 86, pp. 124, 125; C.A. App. 198-238; 25 U.S.C. §§ 2711(b)(1), (2); R. 68, pp. 2954-2967; R. 77, p. 6 ¶ 19).

C. The BIA Approval Of The Management Agreements

The St. Croix Chippewa were responsible for meeting the statutory submission and approval requirements. (R. 77, p. 9 ¶ 28; R. 78, pp. 6-7 ¶ 24; R. 84, p. 64). In September 1991, the St. Croix Chippewa submitted the Management Agreements and other required information to the BIA for review, investigation and approval. (R. 84,

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[3] It was a Mr. Dave Anderson at Grand Casino who ultimately contacted Ken Mosay in Fall, 1992 and suggested that he get an attorney to sue Buffalo Brothers. (R. 88, pp. 17-20).

pp. 77, 78; R. 80, Exh. D). The information submitted to the BIA disclosed that Palmer and Brown were shareholders of Interstate as well as other corporations and indicated that Interstate was already leasing equipment to the St. Croix, as well as other tribes. (R. 84, pp. 88, 89; C.A. App. 98-99; R. 81, Exh. 11, pp. 23-24).

On January 28, 1992 after a full and complete review, the BIA approved the Management Agreements. (R. 81, Exh. 17-20; C.A. App. 56, 58, 117-118). The BIA, like the Tribal Council, knew that Buffalo Brothers and Interstate had common shareholders – Brown and Palmer. (R. 84, pp. 82, 83; C.A. App. 50, 98-109). The BIA also knew of the financial arrangement in the Management Agreements whereby the lease rental payments would be paid as an operating expense prior to the management payment to Buffalo Brothers. (*See* C.A. App. 31-32, 45-46; R. 85 pp. 61, 62). Dr. Earl Barlow, the Area Director of the BIA, testified that the Buffalo Brothers Management Agreements remain in full force and effect, having been given a thorough review and having received written approval pursuant to Section 81. (R. 84, pp. 88, 89).

D. The Buffalo Brothers Investment In The Casino And Commitments To The Tribe

As a consequence of the Tribal and BIA approvals, Buffalo Brothers invested over $7 million to build a casino at Turtle Lake. (C.A. App. 29 § 1.9; R. 77, pp. 9-11 ¶¶ 30, 33; R. 78, pp. 5-6; R. 68, pp. 2590-2921). To finance the project, Buffalo Brothers entered into a participation

agreement with the Bank of Turtle Lake under which the Bank of Turtle Lake would lend money to the St. Croix Chippewa, but Buffalo Brothers would buy 99 percent of the loan and provide 99 percent of the cash for the loan. (R. 68, pp. 2590-2921).[4]

The setting in 1991 when the Management Agreements were executed was quite different from that existing in 1993. Larry Gru, the investment banker for the project, testified that there was "nervousness" about the success of the casino because huge casinos at Mystic and Hinckley in the Twin Cities area were also opening. (R. 86, pp. 48, 49). The history of St. Croix Chippewa gaming showed that the St. Croix Chippewa slot machines at Round Lake were losing money and, in fact, they were removed because they were not productive. (R. 87, p. 23).

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[4] This financing was necessary because in 1991, the St. Croix Chippewa were virtually bankrupt. (R. 88, p. 53; R. 82, pp. 98-100). They described their financial situation in a meeting with the State of Wisconsin Gaming Commission:

> In 1991, the tribal chairman described the St. Croix Chippewa as the "poorest tribe in Wisconsin," and "hopelessly in debt." The tribe had over $1 million of past due bills and was in potential default of its BIA guaranteed loan. . . . The tribe was over $1 million in debt and, as a result, could neither obtain credit nor incur any additional financial risk.

(R. 68, p. 2945). Unlike other tribes, the St. Croix Chippewa tribal lands are far from any major population center or tourist attraction. (R. 78, p. 5 ¶ 16). The eventual site of the casino – Turtle Lake, Wisconsin – is on a secondary highway more than an hour drive from any town of more than 10,000 people. (R. 78, p. 5 ¶ 16; R. 77, p. 6 ¶ 21). Even those few towns were closer to other reservation lands and established or proposed casinos of other tribes. (R. 78, p. 5 ¶ 16).

An April 1993 audit of St. Croix's Round Lake location confirmed there had been a net loss. (R. 87, p. 23).

The Tribe negotiated a number of important provisions into the Management Agreements. There was a sunset provision which terminated the Management Agreements after a number of years and, in order to facilitate transfer of control at that time, Buffalo Brothers agreed to teach tribal members the gaming operation, employ members of the Tribe requesting a job, and act to create an independent casino operation. (C.A. App. 40-41, § 5.8.2; R. 88, pp. 126-128). Buffalo Brothers voluntarily provided funds for the Tribe to pay outstanding, defaulted obligations. (R. 88, p. 47). The results were that within the casino's first year, tribal unemployment dropped from 85 percent to 15 percent. (R. 68, p. 2951 at C.A. App. 29; R. 88, pp. 121 and 122).

E. The Success Of The St. Croix Casino

The St. Croix Casino opened in May 1992. (R. 13, Exh. B, p. 100). The results were exceptional, and led to subsequent infrastructure improvements in the Turtle Lake and Danbury communities, including two hotels, parking lots, restaurants and numerous off-site facilities. (R. 87, Exh. 36; R. 88, Exh. 83-84). Revenues rose and the operation was an unequivocal success. (R. 68, pp. 2944-47; R. 81, Exh. 27-29). There is little tribal unemployment, the St. Croix Chippewa are out of debt, now have substantial assets, and revenues have allowed for a tribal loan program, health care and other services. (*Id.*) Much of the success, according to the investment bankers and other experts, is the quality of the facility and is a direct result

of Buffalo Brothers management efforts. (R. 86, pp. 116 and 117; R. 79, p. 6 ¶ 14).

Shortly after the casino opened in the summer of 1992, and on several later occasions, the Respondents offered to sell the gaming machines to the Tribe rather than continuing to lease the machines from Interstate. (R. 82, p. 138; R. 13, Exh. B, p. 141; R. 77, pp. 10-11 ¶¶ 31-34). The Tribe refused because they did not yet have experience with the casino and were concerned about whether the casino would be profitable in the winter months in northern Wisconsin. (*Id.*). In December 1992, the Tribal Council elected to purchase the machines from Interstate. (R. 13, Exh. B, pp. 144-45). The St. Croix Chippewa agreed, and since January 1993 Interstate has had no further dealings with the St. Croix Chippewa. (C.A. App. 184-190).

The review of the Management Agreement also continued. Buffalo Brothers resubmitted the Management Agreements to the National Indian Gaming Commission ("NIGC" or "Commission"). (R. 80, Exhs. A, B, C). That administrative agency process includes a review of the Management Agreements, the Buffalo Brothers shareholders, officers and directors, and any aspect of the operations which have occurred or will occur at the casino.

SUMMARY OF ARGUMENT

Petitioners have failed to identify or satisfy any of the criteria for obtaining a writ of certiorari. Instead, they have attempted to obtain review by rehashing the same

tired arguments which have been presented, fully considered and rejected by the district court and court of appeals. There is nothing particularly significant or important about this case or the decisions below. It is a garden variety case of statutory construction where the courts below have applied the plain language of two federal statutes to determine the rights of Petitioners vis-a-vis Respondents. The most Petitioners can say is that the decisions below have created a four year "gap" of enforcement of these statutes. This is wrong as a matter of fact and, in all events, points only to a short lived, episodic issue which is not appropriate for review.

REASONS FOR DENYING THE WRIT

I. Petitioners Fail To Identify Or Satisfy The Standards Necessary For Obtaining A Writ Of Certiorari

Certiorari review is limited to cases where there are "special and important reasons therefor." Sup. Ct. R. 10. The problems should reach beyond the "academic or the episodic." *Rice v. Sioux City Memorial Park Comm'n*, 349 U.S. 70, 74 (1955). Petitioners have not met or attempted to demonstrate the usual standards for considering a writ to a United States Court of Appeals. The court of appeals did not create a conflict with any decision of this Court, a coordinate court of appeals, or a state court of last resort. *See* Sup. Ct. R. 10.1(a). Petitioners do not suggest that the court of appeals has, or has sanctioned a departure from the accepted and usual course of judicial proceedings as to require this Court's supervision. *Id.* Nor have the Petitioners directly identified and articulated any specific

"important question of federal law" which should be settled by this Court. *See* Sup. Ct. R. 10.1(c).

Petitioners instead try to obtain review by characterizing the court of appeals decision as "creating a gap in the implementation of IGRA". (Pet. Br., p. 11). As detailed below, this is not correct and only serves to rehash the arguments which were fully considered and rejected below by the district court and court of appeals. More fundamentally, this argument does not raise any "special and important issues" which justify giving Petitioners a third opportunity to air complaints which have already been soundly rejected twice. Sup. Ct. R. 10.

The fundamental question is quite simple: did the Management Agreements comply with the IGRA and 25 U.S.C. § 81? Both the district court and the court of appeals agreed that based on the application of the plain language of the statutes, the Management Agreements did comply with IGRA and 25 U.S.C. § 81. There is no "special and important issue" which arises from a decision to determine the rights of Petitioners and Respondents by applying the plain and ordinary meaning of IGRA and 25 U.S.C. § 81.

The courts below followed the procedure for statutory construction which is mandated by this Court. This Court has repeatedly and consistently emphasized that the starting point in statutory interpretation is the "language [of the statute] itself." *Ardestani v. INS*, 112 S. Ct. 515, 116 L. Ed. 2d 496, 504 (1991 (citing *United States v. James*, 478 U.S. 597, 604 (1986) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J. concurring)). There is a "strong presumption" that the

plain language of the statute expresses congressional intent, and is rebutted only in "rare and exceptional circumstances," *Ardestani v. INS*, 112 S. Ct. 515, 116 L. Ed. 2d 496, 505 (1991) (citing *Rubin v. United States*, 449 U.S. 424, 430, 66 L. Ed. 2d 633, 101 S. Ct. 698 (1981)) and only when a "contrary legislative intent is clearly expressed." *Id.*

The Petitioners' writ of certiorari should be denied.

II. The Seventh Circuit Court Of Appeals Correctly Applied The Plain Language Of The Indian Gaming Regulatory Act And 25 U.S.C. § 81 To Affirm The Dismissal Of Petitioners' Lawsuit

The court of appeals correctly applied the plain language of IGRA and 25 U.S.C. § 81 to affirm the dismissal of Petitioners' claims. Section 81 is an ancient statute enacted in 1876 which governs certain contracts "relative to [Indian] land." It is undisputed that the Management Agreements were submitted to and officially approved by the BIA pursuant to 25 U.S.C. § 81. (R. 81, Exhs. 17-20; App. 56, 58, 117-18). The Petitioners also concede below that the Interstate lease was not a contract which requires BIA approval pursuant to 25 U.S.C. § 81.

The statute on which Petitioners really focus is IGRA. Congress enacted IGRA on October 17, 1988 for the specific purpose of regulating Indian gaming. IGRA is enforced by the National Indian Gaming Commission and a series of regulations promulgated by the Commission. Prior to the creation of the Commission and promulgation of regulations, Indian gaming was regulated through the BIA review and approval of management contracts

pursuant to 25 U.S.C. § 81. *See, e.g., Wisconsin Winnebago Business Comm. v. Koberstein*, 762 F.2d 613, 616 n.3 (7th Cir. 1985); *United States ex rel. Shakopee Mdewakanton Sioux Community v. Pan American Management Company*, 616 F. Supp. 1200 (D. Minn. 1985) (applying § 81 analysis to management contracts).

A. The Seventh Circuit Correctly Applied The Plain Language Of IGRA And 25 U.S.C. § 81

Respondents agree that IGRA was effective on October 17, 1988. The crux of the dispute, however, is how IGRA is applied from the date it was effective to the date the Commission is formed and regulations are promulgated. Petitioners' theory is that once IGRA was enacted in 1988, the BIA was required to apply IGRA standards when reviewing contracts pursuant to 25 U.S.C. § 81. Based on this theory, Petitioners claim that the Management Agreements do not comply with 25 U.S.C. § 81 because the pre-existing Interstate lease was not simultaneously submitted to BIA with the Management Agreements as a "collateral agreement" pursuant to 25 U.S.C. § 2711(a)(3).

The court of appeals rejected Petitioners' theory because 25 U.S.C. § 81 contains no requirements (and does not even mention) "collateral agreements" as a condition or criteria for approval and the plain language of 25 U.S.C. § 2709 does not require (and does not permit) the application of IGRA standards until the Commission is "organized and prescribes regulations." (App., p. 12a). This conclusion is supported by the testimony of Anthony Hope, the Chairman of the National Indian

Gaming Commission, who agreed that the BIA should not have been applying IGRA standards during this period prior to the formation of the Commission and prescription of regulations by the Commission. (R. 166, p. 14).

The plain language of IGRA also supports the finding by the court of appeals. Section 2709 states in full:

> Notwithstanding any other provision of this chapter, *the Secretary shall continue to exercise those authorities vested in the Secretary on the day before October 17, 1988,* relating to supervision of Indian gaming until such time as the Commission is organized and prescribes regulations. The Secretary shall provide staff and support assistance to facilitate an orderly transition to regulation of Indian gaming by the Commission.

25 U.S.C. § 2709 (emphasis added). The district court and court of appeals correctly decided that since the Commission was not organized and had not prescribed regulations as of January 1992, the BIA properly exercised its authority to review and approve the Management Agreements pursuant to 25 U.S.C. § 81 without regard for IGRA. This decision is correct because 25 U.S.C. § 81 was the only authority which existed "on the day before [IGRA was enacted on] October 17, 1988." The court of appeals recognized that since "the Commission would not spring magically into existence with the touch of the congressional wand, on October 17, 1988 Congress preserved the old system of regulation until such time as the Commission did come into existence." (App., p. 11a).

B. The Seventh Circuit Did Not Create a Statutory "Gap"

The decisions below do not create the "gap" in review as claimed by Petitioners. 25 U.S.C. § 2712 requires the Commission to re-review all contracts which were approved under 25 U.S.C. § 81 prior to the enactment of IGRA on October 17, 1988. 25 U.S.C. § 2712(a). 25 U.S.C. §§ 2710(d)(9) and 2711(a) also require the Commission to review all contracts entered into once the Commission is organized and prescribed regulations. Finally, the Commission promulgated regulations requiring the approval of Management Agreements previously approved by the Secretary. *See* 25 C.F.R. §§ 533.1 and 533.2.

Petitioners want the Court to believe that all contracts in the "gap" period between October 17, 1988 and February 22, 1993 escape review. This is wrong. This "gap" contingency was specifically addressed in the regulations promulgated by the Commission. 25 C.F.R. § 533.2 expressly authorizes the Commission to re-review all remaining contracts – including the Management Agreements at issue in this case – which were entered into after the enactment of IGRA, but prior to the time the Commission was organized and regulations prescribed. 25 C.F.R. § 533.2. This eliminates any concerns raised by Petitioners that "the court of appeals decision permanently isolates this group of contracts from IGRA standards" (Pet. Br., pp. 28-29).

C. Respondents Strictly Complied with the Law

The Court should not be persuaded to grant a writ on the Petitioners' baseless claims that Respondents have somehow evaded the law. Respondents have, in fact, complied with IGRA even though compliance was not required. When the St. Croix Chippewa submitted the Management Agreements to the BIA for approval in September 1991, the existing IGRA legislative history *excluded* equipment leases such as the Interstate lease from the IGRA management approval process. S. Rep. No. 446, 100th Cong., 2d Sess. (1988) states:

> Management Contracts. – As used in section 12 and throughout the bill, the term "management contract" refers to agreements governing the overall management and operation of an Indian gaming facility by an entity other than the tribe or its employees. *The term "management contract" does not include contracts or agreements for the procurement of particular services, materials or supplies.* These service or supply agreements, including the supply of gaming aids such as pulltabs, computers, punch boards, and communications or other equipment, are subject to regulation under section 11(b)(2)(D) [25 U.S.C. § 2710(b)(2)(D)]. Charges associated with such services, materials, supplies or equipment are to be included as part of the total operating expenses in determining the net revenues under section 4(10).

Id. at 15, *reprinted in* 1988 U.S. Code Cong. & Admin. News 3071, 3085 (emphasis added).

The first guidance for the § 2711 "collateral agreement" disclosure did not come until the proposed regulations of November 1991 (*i.e.*, two months *after* tribal submission of the Management Agreements and shortly before their approval by the BIA). *See* 56 Fed. Reg. 56278 (1991). Even then, these proposed regulations made it clear that "collateral agreement" would *not* include a pre-existing written lease. The commentary states:

> The Commission looked to case law to determine the meaning of collateral agreement. A collateral agreement is *a prior or contemporaneous oral agreement between parties to a contract which is covered by the Statute of Frauds*. That statute prohibits legal actions on certain contracts unless they are in writing. Courts generally separate out collateral agreements from the main contract for the purpose of admitting parol (oral) evidence concerning the collateral agreement. For that purpose, courts have developed a three part test: (1) Whether the agreement is an independent collateral agreement separate and distinct from the main contract; (2) whether the agreement is consistent with the provisions of the contract; and, (3) whether the agreement is such that the parties could not reasonably be expected to embody it in the contract, but would naturally make it as a separate agreement. *Markoff v. Kreiner*, 23 A.2d 19 (1941). Implicit in the test is a fourth criterion: (4) Whether the identity of the parties is the same. When all four parts of the test are met, the Commission would consider an agreement as a collateral agreement and therefore subject to the statutory requirements concerning management contracts.

56 Fed. Reg. 56279-80. Even Dr. Earl Barlow, the BIA Area Director who reviewed and approved the Management Agreements, properly concluded, and so testified, that at this time he understood a "collateral agreement" to mean a "prior or contemporaneous *oral* agreement." (R. 84, p. 40). In short, there is no way to consider a pre-existing unrelated *written* lease, with obligations separate and distinct from management agreements, with a separate and distinct corporate entity, to be within this proposed regulation.

It was not until April 9, 1992, over a *month after* the official BIA approval of the Management Agreements, that other proposed federal regulations first suggested that the definition of "collateral agreements" would be expanded to potentially include equipment leases.[5] This regulation was published *after* official BIA approval of the Management Agreements and the regulation specifically stated that it reflected a change of interpretation:

> The Commission had, in its preamble to the proposed rule, indicated it would view collateral agreements narrowly. *Upon reflection the Commission decided a broader definition would more closely implement Congress' intent.*

57 Fed. Reg. 12382, 12388 (1992). This regulation did not become effective until February 22, 1993, three months *after the filing of this lawsuit*, and two months after the

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[5] Dr. Barlow testified that at best it was not until March 1992 (two months after his approval of the Buffalo Brothers Management Agreement) that there was ever any discretionary guidance mentioning equipment leases in Section 81. (R. 84, p. 63).

Interstate lease was ended. (R. 84, p. 52). Neither the Secretary nor the Buffalo Brothers are prescient. They could not predict the future, nor should they be obligated to comply with regulations not yet promulgated at the time the Management Agreements were submitted. The fact remains that the Management Agreements were properly submitted and approved pursuant to 25 U.S.C. § 81. Nothing more is required.

The Petitioners' Writ of Certiorari should be denied.

CONCLUSION

The fundamental issue in this case is the interpretation of two federal statutes. This Court has provided numerous decisions on the interpretation of statutes, and the district court and court of appeals have abided by those decisions. The court of appeals has produced a clear and well reasoned decision utilizing the applicable decisions of this Court in interpreting a clear and unambiguous statute, encompassing the intent of Congress. Therefore, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Dated this 29th day of July, 1994.

Respectfully submitted,

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